PEMUNYA KARGO YANG DIMUATKAN KEATAS KAPAL MV "GANG CHENG"

v.

PEMUNYA KAPAL MV "GANG CHENG" (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ADMIRALTY IN REM NO: D5-27-10-1993 (2)]
6 AUGUST 1998

CIVIL PROCEDURE: *Judgments and orders - Amendment - Judgment in Malaysian Ringgit - Application for conversion to United States Dollars - Whether to be allowed - Principles - Whether judgment had been perfected, passed and entered - Whether conversion would best express the party's loss*

The plaintiffs were the owners of a cargo of maize that was shipped on board the M.V. "Gang Cheng" and unloaded in Malaysia. The defendants were the owners of the M.V. "Gang Cheng". The plaintiffs claimed that the maize was damaged when unloaded due to breaches of the Hague Rules and the negligence of the defendants. The court then awarded judgment in favor of the plaintiff in the sum of RM1,857,262.69 or its equivalent in United States Dollars at the time of payment ('the Order'). Before any draft judgment was drawn up for approval, the plaintiffs filed a notice of motion to vary the said judgment to read as follows:

The judgment sum of RM1,857,262.69 awarded to the plaintiff be converted to and expressed as US$727,197.6077 being the equivalent of RM1,857,262.69 at the rate of RM2.5540 to US$1.00.

The issue before the court was whether such a variation could and ought to be allowed.

Held:

[1] The court has an inherent power to vary its own order so as to carry out its own meaning and to express its meaning as plainly as possible. To do justice, it is necessary that the court be given a discretion to recall and correct any misgivings in its judgment before it is perfected, to bring it into harmony with the order, which the court obviously meant to pronounce.

[2] A matter or *'res'* in relation to *'res judicata'* is formally and finally decided or adjudicated by a court of law when the court's judgment, decision or order on the matter or *'res'* is perfected, or in other words passed and entered. Only at that stage is a judge *functus officio*. In the present case, the order has not yet been perfected as no draft judgment has been drawn up by either party to be presented to the other for approval.

[3] The material transactions between the parties were in United States Dollars and the plaintiff had also led evidence indicating that conversions were done at the rate of RM2.5540 to the US$1.00 In the circumstances, since no specific currency was pleaded in the statement of claim when damages was sought and since the contract for the purchase of the cargo was in United States currency, and further since the payment of the cargo was also effected in United States currency and since unchallenged evidence exists as to the specific rate of exchange of RM2.5540 to US$1.00 and since the order has not been perfected, the court had the jurisdiction to vary the order.

[Application allowed; order varied accordingly.]

Case(s) referred to:
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1996] 2 CLJ 104 ***(refd)***
In re Harrison's Share Under a Settlement, Harrison v. Harrison et al [1955] 1 Ch 260 ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Co [1968] 1 MLJ 265 ***(refd)***
Millensted v. Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 ***(refd)***
Miliangos v. George Frank (Textiles) Ltd [1976] AC 443 ***(refd)***
New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd, New Hebrides (In Liquidation) [1987] 2 MLJ 57 ***(refd)***
Pittalis & Others v. Sherefittin [1986] 2 All ER 227 ***(refd)***
Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd [1991] 1 CLJ 109 ***(refd)***
Tay Cho Koh v. Tay Ek Seng Co Sdn Bhd & Ors [1974] 1 MLJ 179 ***(refd)***
The Despina [1979] AC 685 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 59 r. 19

For the plaintiff - Darryl Goon (Ng Sai Yeang with him); M/s Raja, Darryl & Loh
For the defendant - Arun Khrishnalingam; M/s Shearn Delamore & Co

Reported by Ling Hea Hoon & WA Sharif

JUDGMENT

RK Nathan J:

Facts

The plaintiffs were owners of a cargo of maize that was shipped on board the M.V. "Gang Cheng" and unloaded at 2 ports in Malaysia. The defendants were the owners of the MV "Gang Cheng". The plaintiffs contended that the maize was damaged when unloaded due to breaches of the Hague Rules and due to negligence on the part of the defendants.

After a long and protracted trial with each party calling their respective experts I gave my decision on 15 October 1997 wherein I found for the plaintiffs and awarded:

(1) RM1,857,262.69 or its equivalent in United States Dollars at the time of payment.

(2) Interest at the rate of 8% p.a. from date of service of writ to date of judgment.

(3) Costs to be paid by the defendants to the plaintiffs.

(4) On the issue of costs, a certificate for two counsel pursuant to O. 59 r. 19 of the RHC given the complexities of this case.

The Application

The plaintiffs then filed a notice of motion (encl. 93) to vary my decision to read as follows:

(1) The judgment sum of RM1,857,262.69 awarded to the plaintiff be converted to and expressed as US$727,197.6077 being the equivalent of RM1,857,262.69 at the rate of RM2.5540 to US$1.

(2) Provisions be made for the cost of and incidental to the application herein.

(3) Such further or other orders as the learned judge may deem fit.

This motion was vigorously opposed by the defendants.

Findings Of The Court

This writ was issued on 22 April 1993. Because of case management that was introduced, this case was called up for numerous pre-trial case managements. The hearing began on 8 July 1996 and the case was concluded on 24 January 1997. Parties then took time with their written submissions and

the final submission was filed with the court on 28 May 1997. The court indicated that due to the complexities of the case and the evidence of experts and the documents tendered together with the vast number of authorities submitted, the court would take time to deliberate on the matter. An oral decision was given on 15 October 1997.

Fall In The Ringgit

However, due to various economic and unprecedented and unforeseen circumstances the value of the Malaysian Ringgit began to drop in relation to, *inter alia,* the United States Dollar. It is also not in dispute that as at 14 July 1997, that is, the day before the decision was given the value of the Malaysian Ringgit *vis-a-vis* the United States Dollar was approximately RM2.55 to US$1. At about the time this application was made in October 1997 the value of the Malaysian Ringgit had dropped to RM3.16 to US$1. Today the Malaysian Ringgit has dropped to around RM4.10 to US$1. This represents a substantial drop in the value of the Malaysian Ringgit. No doubt no one had foreseen this dramatic drop, not even the economic experts, let alone the plaintiffs' legal advisers.

Currency Of Transaction

It is clear from the evidence of the witnesses, that the material transactions were in United States Dollars. The contract for the purchase of the cargo which included shipment charges, was in United States currency, payment by the plaintiffs under the said contract was also in United States currency. Needless to say, there was an equivalent conversion of the said figures into Malaysian Ringgit. The reason is obvious because there were some expenses that were incurred by the plaintiffs in Malaysian Ringgit. However, what is significant is that the plaintiffs led evidence to the effect that these conversions were done at the rate of RM2.5540 to the US$1. This evidence relating to this rate of exchange was neither challenged nor objected to by the defence.

It is obvious that there must have been a reason for the plaintiffs to have adduced such evidence. If the defendants had all along intended that the award ought to have been in Malaysian Ringgit, surely this was the stage to have questioned the need to have this rating on record. The conversion rate could apply either way. Since the award was made in Malaysian Ringgit and the rate of exchange has not been objected to, it is my judgment that the plaintiffs have every right to make the application to vary the order as prayed for so long as the said order had not been perfected or passed and entered.

As the damage caused to the cargo was bought and paid for in United States currency, justice must also require, if the plaintiffs so seek, that their loss as found by the court ought in like circumstances be also awarded in the United States currency.

Needless to say, this action was issued in Malaysia since the MV "Gang Cheng" was arrested in Malaysia when it called at our local ports. I find no nexus between the Malaysian currency and the said contract involving the said cargo. I note as a fact that the owners of MV "Gang Cheng" are not Malaysians. There is no evidence before me that the insurers of the MV "Gang Cheng", the party finally liable to pay the damages, are also Malaysians. Indeed a very pertinent fact that I must consider to rule in favour of the plaintiffs is that even the defendants decided to provide the security for the release of the MV "Gang Cheng" after its arrest, in United States currency.

Order Dated 15 October 1997 Not Perfected

It is not in dispute that my order dated 15 October 1997 has not as yet been perfected. In fact no draft judgment has even been drawn up by either party to be presented to the other for approval. I therefore make a finding that to date the said judgment has not been passed and entered or perfected.

Surely the court has an inherent power to vary its own order so as to carry out its own meaning and to express its meaning as plainly as possible. To do justice it is necessary that the court be given a discretion to recall and correct any misgivings in its judgment before it is perfected, to bring it into harmony with the order which the court obviously meant to pronounce.

In *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717 the Court of Appeal said at p. 726:

> It is now well settled, that until an order made by a judge has been perfected, by being passed and entered, there is no final order, and consequently the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make: see In *re Suffield & Watts; Ex parte Brown* (20 Q.B.D. 693); and no objection can therefore be taken, merely on the ground that the order, as drawn up, differs from the order that the learned judge originally stated he would make.

This decision was also followed by the Court of Appeal in *Pittalis & Others v. Sherefittin* [1986] 2 All ER 227.

Mr Darryl Goon for the plaintiffs took pains to explain the decision of the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 2 MLJ 57 CA. I need not labour myself on this any further because the Court of Appeal in a very recent decision (unreported as yet), namely,

Skrine & Company v. MBf Capital & Anor and another case Civil Appeal No. W-03-27-98 clarified any possible ambiguity in *Hartecon* by stating that its ruling in the *Hartecon* must be considered upon the facts contained therein where the trial judge who was faced with an objection as to the form of proceedings before him and who had initially come to the conclusion that the form chosen by the applicants was regular yet upon the same point being re-agitated in the same proceedings he changed his mind, altered his order and held the proceedings to be bad in form. That is not the case here.

The case of *In Re Harrison's Share Under a Settlement, Harrison v. Harrison et al* [1955] 1 Ch 260 is well to point. The Court of Appeal held that an order pronounced by a judge, whether in open court or in chambers, can always be withdrawn, altered or modified by him, either on his own initiative or on the application of a party, until such time as the order has been drawn up, passed and entered. The oral order is meanwhile provisionally effective, and can be treated as a subsisting order where the justice of the case requires it and the right of withdrawal would not thereby be prevented or prejudiced. It further held that when a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed; such control, however, must be used in accordance with his discretion, exercised judicially and not capriciously. In the light of the clarification by the Court of Appeal I will dwell no further on the many cases relied on by Mr Darryl Goon. It is my judgment that a matter or *'res'* in relation to *'res judicata'* is formally and finally decided or adjudicated by a court of law when the court's judgment, decision or order on the matter or *'res'* is perfected, or in other words passed and entered. I hold that only at that stage is a judge *functus officio* and is no longer seised of the matter and *res judicata* applies. Until this is done the trial judge can vary, or modify his order or judgment. In fact Fox LJ said in *Pittalis (supra)* at p. 234:

> ... As a matter of the sensible administration of justice and fairness between parties, it seems to me proper in the circumstances that the judge should be at liberty to recall his order. The position can properly be called exceptional.

Avoidance Of Unjust Enrichment Or Loss

In *Ling Nam Rubber Works v. Leong Bee & Co* [1968] 1 MLJ 265, the then Federal Court allowed a judgment to be altered, before it was drawn up, passed and entered on the basis that although there was earlier no express direction for the payment of interest on the sum, since it was not earlier asked for, on the principle that to refuse interest would be tantamount to condoning and approving unjust enrichment of the respondents to the extent that they had had the use and benefit of monies to which the appellants were justly entitled, the application to include a prayer for interest was therefore allowed, before

the order was perfected. Further in *Tay Cho Koh v. Tay Ek Seng Co Sdn Bhd & Ors* [1974] 1 MLJ 179 the learned judge reiterated the view expressed by Roxburgh J in *Re Harrison (supra)* that a trial judge had a right to exercise his discretion to include a further prayer in his order upon a subsequent application, so long as the said order had not been perfected and that something was brought to his attention in that application, which he had not sufficiently considered earlier. Further in *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 the trial judge held that he had jurisdiction to vary the order which had not been perfected if he was uncomfortable with the order as manifested.

In the case before me, since no specific currency was pleaded in the statement of claim when damages were sought and since the contract for the purchase of the cargo was in United States currency and further since the payment of the cargo was also effected in United States currency and since unchallenged evidence exists as to the specific rate of exchange of RM2.5540 to US$1 and since the order dated 15 October 1997 has not been perfected, I hold that I have the jurisdiction to vary the said order.

Surely if the damages are to be considered in Malaysian Ringgit and considering the almost 40% fall in the value of the Malaysian Ringgit to the US$1 there will be unjust enrichment to the defendants and unjust loss would befall the plaintiffs. Besides this, the question of the currency in which damages were to be awarded was something which I had not considered earlier, and needless to say that I am not at all comfortable with the intention manifested by the order dated 15 October 1997 which does not expressly state the currency in which the damages were to be made.

This does not mean that a court has an unlimited power to withdraw or alter or amend its earlier order which has not been perfected. There is a check and it is that there must be a doubt regarding the correctness of that order or the existence of a patent or a latent ambiguity in that order. The contention that there has been a tremendous fall in the value of the Ringgit as affirmed in the plaintiffs' affidavit has not been controverted by any affidavit of the defendant.

Jurisdiction To Award Damages In Foreign Currencies

In *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd, New Hebrides (In Liquidation)* [1987] 2 MLJ 57 the then Supreme Court affirmed the trial Judge's decision to give judgment in United States currency. I can do no better than cite the judgment of Lord Wilberforce in *'The Despina'* [1979] AC 685 at 701 wherein his Lordship said at p. 701:

> If then the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the plaintiff or 'which most truly expresses his loss.' This is not limited to that in which it first and immediately arose. In ascertaining which this currency is, the court must ask what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation.

Mr Arun for the defence vociferously argued that since in their submission the plaintiffs had asked for damages in Ringgit, they were awarded what they had asked for. But such a submission fails to consider the very purpose and nature of this notice of motion. It is because of that error that the plaintiffs now seek to rectify the order that has not been perfected. In fact, in *Ling Nam Rubber Works (supra)* the appellants' counsel had 'forgotten to ask then and there for interest as well, so that the order was tacit with regard thereto'. In the result an application was made, like in this case, before the order was passed and entered, for an amendment to include the interests. The same has happened in this case. Counsel had omitted to ask for the award of damages in the currency that best expressed the party's loss. Perhaps at that stage he might have thought it was unnecessary. In any case I cannot even in this case consider this omission as an error. It is the intervening act of the fall of the value of the Ringgit between the pronouncement of the judgment and the perfection of the order that had necessitated this amendment to the order. Therefore it is not correct for the defence to contend that by submitting for the award of damages to be in Malaysian Ringgit or its equivalent in United States currency the plaintiffs were bound by what they received by way of judgment in Malaysian Ringgit.

Counsel for the defence also argued that if I allowed this application I would be opening the flood gates to many such applications in that every plaintiff who has a judgment which can be expressed in more than one currency could come forward to seek a variation whenever the fluctuation benefits the plaintiff. This submission is flawed from inception. If the facts denote as in this case that there was a clear trading in United States currency and unchallenged evidence was adduced as to the rate of the Malaysian Ringgit to the US$1 then whether it is one case or a hundred, the road to justice must be open to each and every one of them. The flood gate principle must not be used to shut out the legitimate claim of a litigant.

Mr Arun relied fully on *Miliangos v. George Frank (Textiles) Ltd* [1976] AC 443 to argue against this application. In the *Miliangos* the House of Lords decided that a plaintiff suing for a debt payable in Swiss francs under a contract governed by Swiss law could claim and recover judgment in England in Swiss francs. However it left open for a later decision whether the same,

or a similar rule could be applied in cases where a plaintiff sues for damages in tort or where a plaintiff sues for damages for breach of contract. In fact in *'The Despina' (supra)* the House of Lords considered *Miliangos* and held that in a claim based on tort the principles to be applied in ascertaining the currency of the loss were those of *restitutio in integrum* and reasonable foreseeability. In relation to contract it held that where the terms of the contract governed by English law did not expressly or by implication show that the parties had intended that payments arising from a breach of contract were to be paid in the currency of account or other named currency, the court should give judgment in the currency that best expressed the party's loss. To my mind it is only just and reasonable that the plaintiff should recover the loss, to be calculated in the currency that appropriately reflects its loss, based on compensatory principles.

Having considered all the authorities submitted by both parties I order that the judgment sum of RM1,857,262.69 awarded to the plaintiffs be converted to and be expressed as US$727,197.6077 being the equivalent of RM1,857,262.69 at the rate of RM2.5540 to US$1 with costs to the plaintiff.